IN THE MATTER OF the Human Rights Code, R.S.O. 1990, c.H-19;

BETWEEN :

DIANNE SCHOFIELD and VERA SUDDARD,

Complainants

-and-

THE OSHAWA GENERAL HOSPITAL and RUBEN BENMERGUI

Respondents

Before: Deborah J. Leighton
Chair, Board of Inquiry

Appearances: Kikee Malik, Counsel for the Commission

Diane Schofield and Vera Suddard the Complainants in person

Roy Filion, representing Oshawa General Hospital

Ruben Benmergui, in person

John Gilmore, Student-at-Law

Place: Oshawa, Ontario

Date: February 11, 1993

DECISION ON PRELIMINARY MOTION

I Introduction

On September 25, 1992, pursuant to subsection 38(1)[1] of the Human Rights Code R.S.O. 1990, c.H-19 (the "Code"), I was appointed by the Minister of Citizenship as the Board of Inquiry to hear and decide the complaints of Dianne Schofield and Vera Suddard dated September 30, 1986 and January 13, 1987, respectively alleging discrimination in employment on the basis of sex and age by Oshawa General Hospital and Ruben Benmergui. By conference call on October 21, 1992 counsel for the Hospital and Mr. Benmergui indicated that they wished to make interim motions to dismiss the complaints. A date was set to hear these motions in order that they would be heard with sufficient time for an interim decision if and when the hearing went forward in March.

The original date for the preliminary motions was set for December 22, 1992. During the conference call I requested that counsel submit factums and case law to me by December 15, 1992. I received the required submissions from Counsel for the hospital and Mr. Benmergui before this date. However, by letter dated December 14, 1992 Counsel for the Commission requested an adjournment of the December 22 date: because of a very heavy workload and time constraints she had been unable to complete the factum on the issues. A new date for the preliminary motions was set for January 8, 1993.

Unfortunately, due to ill health, Counsel for the Commission asked for another adjournment of the January 8, 1993 date and the hearing was set back to February 11, 1993. I heard the preliminary motions of the respondents on February 11, 1993 in Oshawa at a full day hearing.

The Respondents are separately represented, Mr. Benmergui

---

[1] Throughout this decision all references to the Code will use the Revised Statutes of Ontario, 1990; there has been no change in the Code relevant to this case, since the original events occurred.

representing himself. The grounds for their preliminary motions, while sometimes overlapping, are different and I will thus deal with them separately. However, the factual basis of both is best dealt with in a short summary first.

II The Facts

As noted earlier, the complaints by Ms. Schofield and Ms. Suddard were filed in 1986 and 1987 respectively. By letters of April 3, 1990 the Commission notified the Respondents that it had decided not to request the appointment of a Board of inquiry to hear these complaints.

By letter of April 18, 1990 Counsel for Ms. Suddard requested that the Commission reconsider its decision not to request an appointment of a board of inquiry. On April 20, 1990 the Commission's Office of Reconsideration informed the Respondents that a request for consideration had been made by Ms. Suddard and asked for the Respondents' submission by May 7, 1990.

By letter of May 18, 1990 Counsel for Ms. Schofield requested that the Commission reconsider its decision not to request the Minister to appoint a board of inquiry for the complaint. By letter of May 24, 1990 the Commission's Office of Reconsideration informed the Respondent Hospital that an application for reconsideration had been made and asked for the Hospital's submissions by June 8, 1990. On June 4, 1990 the Director of Personnel of the Hospital notified the Office of Reconsideration of the Hospital's objection to the late request for reconsideration by Ms. Schofield. The Commission informed the Respondent Hospital that their response to Ms. Schofield's request for a reconsideration was sent to Ms. Schofield for her comment.

On March 17, 1992 the Respondent Hospital received notice from the Office of Reconsideration that reports on both complaints had been prepared and would be submitted to the Commission for final consideration. These reports were sent to the Respondent Hospital for further submissions by the Hospital. Both reports supported the earlier decision of the Commission not to appoint a board of

inquiry. By an undated letter received by the Respondent Hospital on August 18, 1992 regarding Ms. Schofield, and August 25, 1992 regarding Ms. Suddard, the Commission advised that it had requested that the Minister of Citizenship appoint a board of inquiry to hear the complaints of Ms. Schofield and Ms. Suddard together. No reasons were given for granting the Applicants' request for reconsideration and requesting a board to be appointed.

Mr. Benmergui was never notified by the Commission about Ms. Schofield's reconsideration request and therefore made no submissions regarding it. He was unaware that it had even been made until he was notified that the Commission had decided to request a board of inquiry to be appointed. With respect to Ms. Suddard's request for reconsideration, Mr. Benmergui was informed about it but not provided with the reconsideration report prepared by the Commission. Therefore he was not able to make submissions.

III a. Mr. Benmergui's Motion to Dismiss

Mr. Benmergui argued at the hearing on February 11, 1993 and in the materials which he filed with the Board December 8, 1992 that the complaints against him by Ms. Schofield and Ms. Suddard should be dismissed. His submission stated the following:

1. Pursuant to Section 7 of the Canadian Charter of Rights and Freedoms, the perspective holding of a proceeding before a Board of Inquiry appointed pursuant to Section 36(1) of the Ontario Human Rights Code 1981, constitutes inter alia "on grounds of unreasonable delay, a withdrawal or deprivation of my right to life, liberty and security of the person."

2. Pursuant to Section 7 of the Canadian Charter of Rights and Freedoms, the perspective holding of a proceeding before a Board of Inquiry appointed pursuant to Section 36(1) of the Ontario Human Rights Code 1981, constitutes inter alia "an abrogation of the requirement that any such proceeding be in accordance with the principles of fundamental justice, namely, that the delay denigrates my ability to defend the portion of the complaint relating to me, and that ignoring the time limits mandated by the Code without just and sufficient reasons, further constitutes an abuse of process."

3. Notwithstanding that the Human Rights Commission had a valid mailing address for me it continued to send some documents to my former employer. Specifically, I was not informed, despite the indication to the contrary in the Commission's correspondence, of the requests for reconsideration, nor given an opportunity to make a submission at the time of reconsideration.

In response to paragraph three in Mr. Benmergui's submission of December 8, 1992, the Commission wrote to Mr. Benmergui one day prior to the scheduled day for the preliminary hearing, that is on February 10, 1993. This letter, from the Acting Chief Commissioner recognized that Mr. Benmergui had not been provided with notice of the request for reconsideration of Ms. Schofield and therefore the opportunity to make submissions. It further acknowledged that the reconsideration report regarding Ms. Suddard had not been provided to him for his submissions. The Commission proposed to re-hear the Applications for reconsideration of Ms. Suddard and Ms. Schofield and permit Mr. Benmergui to make submissions before the Commission's next meeting which would have taken place on March 2 - 4, 1993.

Because of the short notice of the issue which this letter from the Acting Commissioner raised I permitted Counsel for the Commission, for the Hospital and Mr. Benmergui to make additional submissions to me in writing. I received written submissions from Mr. Benmergui, Counsel for the Respondent Hospital and Counsel for the Commission. I received a reply to Commission's Counsel's submission from the Respondent Hospital's Counsel on April 15, 1993. I received a further submission from Commission Counsel on April 19, 1993.

b. <u>The Decision</u>

Boards of inquiry must hear and decide preliminary matters such as motions to dismiss because of delay and bias. The Divisional Court will not entertain applications based on preliminary matters until the board of inquiry has made a decision and dealt with the case. See <u>Latif v. Ontario (Human Rights</u>

Commission) Div. Ct. unreported, March 11, 1992; leave to appeal denied Ont. C.A. June 8, 1992; Hancock v. Ontario (Human Rights Commission) Div. Ct. unreported Nov. 10, 1992; Ontario College of Art et al. v. Ontario (Human Rights Commission) (1993), 11 OR (3d) 798 (Div. Ct). The Court in Ontario College of Art said:

> These decisions follow a long line of authority which has indicated the need to avoid a piecemeal approach to Judicial Review of administrative action. The Board of Inquiry in this case has jurisdiction to entertain and determine any of the issues which have been so ably advanced by Ms. Roberts. This includes her argument that bias has tainted the appointment of the Board of Inquiry. The Board of Inquiry also, of course, has the jurisdiction to consider the allegation of delay as it affected these proceedings...(emphasis added) (p.800)

The Divisional Court decisions indicate that boards of inquiry have the jurisdiction to consider all preliminary matters raised by the parties. Thus I conclude that I may consider and decide the preliminary motions brought by both Respondents.

The nature of the Human Rights Commission decision to request a board of inquiry is administrative in nature and therefore not subject to the requirements of natural justice. F.W.T.A.O. v Ontario (Human Rights Commission) (1989) 10 C.H.R.R. D/5877 (Div. Ct.) and Re Dagg and Ontario (Human Rights Commission) (1979) 26 O.R. 2d 100 (Div. Ct.). However, the Supreme Court of Canada stated in Nicholson v Haldimand Norfolk (1979) 1 S.C.R. 311 that whether or not a decision is judicial, quasi-judicial or administrative, there is always a duty of fairness. In Martineau v Matsqui Inst.(2) 106 D.L.R. (3d) 385 (S.C.C.) the Supreme Court said that the question to ask was whether or not the tribunal acted fairly. In F.W.T.A.O. the Divisional Court considered the Human Rights Commission's duty of fairness. The Court held that the duty of fairness when dealing with an investigative body such as the Ontario Human Rights Commission required that an interested party be informed of the substance of the complaint and permitted an opportunity to respond.

In Commercial Union Assurance v. Ontario (Human Rights

Commission) 1988 9 C.H.R.R. D/5140 (Div. Ct.), affirmed 9 C.H.R.R. D/5144 (C.A.) the Divisional Court granted an application for Judicial Review and quashed the Commission's decision to request an appointment of a board of inquiry on the basis that the Commission had breached its duty of fairness. The Commission conceded that it had breached its duty of fairness when it did not permit the Respondent in that case an opportunity to review and respond to the reconsideration report provided to the Commissioners before it made its decision to appoint a board of inquiry.

In the case before me the facts are almost identical to Commercial Union. Commission Counsel also concedes that there has been a deficiency in its process and by the letter of the Acting Chief Commissioner dated February 10, 1993 the Commission seeks to correct what it views as an error of procedure. Mr. Benmergui was not notified of the Schofield reconsideration and was not given an opportunity to review and respond to the Suddard reconsideration report.

Commission Counsel argues that where a decision has been made contrary to the rules of procedural fairness the breach of fairness can be cured if the decision making body holds a re-hearing of the whole matter with a fair and open mind and corrects the errors or deficiencies which occurred in the first hearing. Commission Counsel relies on Posluns v The Toronto Stock Exchange (1964) 2 O.R. 547; affirmed (1966) 1 O.R.285; (affirmed) 1968 S.C.R. 330. In Posluns the Securities Commission was found to have cured a breach of fairness committed at an original hearing by re-hearing the same matter. Thus, Commission Counsel argues that in failing to afford Mr. Benmergui the opportunity to make submissions and representations on the reconsideration, the Commission's decision to request an appointment of a Board of Inquiry is invalidated. In the alternative, the Commission argues that if I hold that a re-hearing is not possible by the Commission any procedural unfairness which occurred before the Commission may be cured by a full hearing before the Board of Inquiry.

As Commission Counsel conceded at the hearing, no higher

tribunal or court was seized of the matter in Posluns, when the Securities Commission reheard the case. These are not the facts here. As noted earlier, I was appointed to hear this case in September and I began the hearing by conference call on October 21, 1992.

Further the legislative framework for the Securities Commission as outlined in the Posluns case and the legislation for Human Rights are significantly different and sufficient to distinguish the Posluns case. The framework under the Code is that a complaint brought before the Commission is investigated, a recommendation is made in a report to the Commissioners and the Commissioners decide whether or not to request the Minister of Citizenship to appoint a board of inquiry to hear the matter. Once there has been a decision to request that a board of inquiry be appointed and a request goes to the Minister, the Commission loses its right to further investigate or to re-hear because it then takes on its role as prosecutor under the Code. (See Section 39) Because of the special dual functions of the Commission, it would be improper to allow the Commission to "take back" a complaint if it realized there had been a substantial error of procedure and attempt to fix it after it had requested the Minister to appoint a board of inquiry.

Once a request for a board of inquiry is made to the Minister the principle of functus officio applies i.e. that an administrative tribunal or court, once it has reached its decision, cannot afterwards alter its award except to correct minor clerical mistakes or errors arising from an accidental slip or omission. Given the Commission's concession that not permitting Mr. Benmergui an opportunity to make submissions on the reconsideration is a breach of fairness, it cannot be held that this breach is a minor error allowing the Commission to correct the matter.

The errors in procedure which occurred during the reconsideration of these two complaints have resulted in a breach of fairness to the Respondent Mr. Benmergui. The purpose of the procedure is to permit parties to have full information on what is

being reconsidered by the Commission and to make full response. We cannot know now what the outcome might have been had Mr. Benmergui been given the opportunity to make submissions. Had he made submissions the Commission may not have decided to request appointment of a board of inquiry. Thus, to go forward now with a full hearing does not cure the defective process. There is undoubtedly prejudice to a respondent if he or she is put to a defence of a lengthy case when it might not be warranted. This prejudice cannot be cured by an award of costs.

I am of the view that to go forward now would be an abuse of process contrary to Section 23 of the Statutory Powers and Procedure Act, R.S.O. 1990 c.S. 22, which provides as follows:

> A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

In Shreve v. Hancock (Board of Inquiry (unreported) March 3, 1993) the Board of Inquiry pointed out that it is possible that where a breach of fairness or procedural error occurs at a preliminary or first stage of an administrative process, the error or breach may be cured subsequently by the opportunity of a full and fair hearing. However, the Board went on to hold that in some cases unfairness at any earlier step may not be cured and to go forward with a hearing would amount to an abuse of process at the board of inquiry:

> The fact, however, that an abuse of process was engaged in by a separate, and indeed arms-length, body from the tribunal in question does not preclude the possibility of a nexus between the abuse and processes of the tribunal. Similarly, the availability of a fair proceeding by the tribunal in question does not necessarily mean that all unfairness at any earlier step can be cured. The particular circumstances need to be examined to determine if proceedings by the tribunal in question will be free of taint from an earlier abuse of process and can cure unfairness that occurred at an earlier step. Thus, it is within my powers to examine the merits of the allegations of unfairness made by the Respondents in this case to determine whether, in light thereof, continuation of the proceedings before me would be an abuse of process.

I agree with this approach. Where a significant breach or error of procedure occurs during the investigation of the complaint or decision to request a board of inquiry, which cannot be rectified, it would be an abuse of process for a board of inquiry to proceed with a full hearing on the merits.

Counsel for the Commission argued that had this application been brought to the Divisional Court, the Divisional Court would have sent it back to the Commission so that the procedural errors could be corrected. However, it is clear from the Commercial Union case that this is not necessarily so. In the Commercial Union case the Divisional Court did not send the matter back to the Commission since it was of the view that it would be very difficult for the Respondent to get a fair hearing at that point and also because of the inordinate delay. I am directed by the reasoning of the Divisional Court in this case.

While the purpose of the Code is to redress discrimination in Ontario and its interpretation should be broadly and liberally applied it must also be balanced against the rights of the Respondents. The Schofield and Suddard complaints were brought in 1986 and 1987 respectively. As in the Commercial Union case, it took two years for the reconsideration to be done, a delay which the Divisional Court in Commercial Union considered excessive. As noted in the introduction there was further delay in hearing the Respondent's preliminary motion. It is almost a year since the Commission's decision to appoint a board. While the delay alone is not enough to warrant a dismissal, it is adequate reason not to refer the matter back to the Commission.

Moreover, as Commission Counsel argued the Divisional Court's direction to boards of inquiry to deal with all preliminary matters does not turn the board into a Divisional Court. While it would seem to be clear that a board may dismiss or permanently stay a matter, it is not at all clear that it is within the board's power to send a case back. Finally, since I am basing my decision to stay on Section 23 of the Statutory Powers and Procedures Act, I do not need to decide whether a board has jurisdiction to quash its

own appointment or the decision of the Commission.

In conclusion, with regard to the Respondent Mr. Benmergui, I permanently stay the complaints of Ms. Schofield and Ms. Suddard as against him for the reasons outlined above. Consequently I do not need to address his Charter argument.

IV The Respondent Hospital's Motion

Counsel for the Respondent Hospital raised four preliminary objections to the jurisdiction of this Board at the hearing into this matter. These are:

1. The Commission failed to give reasons for the reversal of its Decision dated April 3, 1990, wherein the parties were notified that the Commission would not request the Minister to appoint a Board of Inquiry. Pursuant to Section 37 (3) [formerly 36 (3)] of the Human Rights Code are S.O. 1990 c.H. 19 ("the Code"), the Commission is required to provide written reasons for its decision after an application for reconsideration. Since this was not done it is submitted that the appointment of the Board of Inquiry is invalid.

2. The application for reconsideration was untimely. Pursuant to Section 37 (1) [formerly 36 (1)] of the Code the application for reconsideration filed by Counsel for the Complainant Diane Schofield should have been made within fifteen days of the Commission's decision, but was not made until approximately forty-five days after the Commission's decision. Although the Commission is entitled to extend that time limit "for special reasons", no such special reasons were advanced on behalf of the Complainant, nor does it appear that any special reasons were taken into account by the Commission. Accordingly, it is submitted that the Commission erred in even entertaining the application for reconsideration.

3. The Respondent Hospital had been prejudiced in its ability to defend itself against the allegations made by the Complainants in view of the unreasonable delay on the part of the Commission in processing the complaints and requesting the appointment of a Board of Inquiry.

4. There is a reasonable apprehension that the Commission was biased or unduly influenced, in granting reconsideration, by the fact that the submissions on behalf of the Complainants were made by the firm headed by Mary Cornish, the same person who chaired the Task Force relating to the operation of the Ontario Human

> Rights Commission, particularly in view of the absence of the reasons for granting the reconsideration and a record that discloses that a Board of Inquiry should not have been appointed.

At the hearing into this matter Counsel for the Respondent Hospital withdrew the second objection regarding the timeliness of the request for reconsideration of Ms. Schofield when an affidavit was presented at the hearing by the Commission explaining for the first time since the Hospital's objection in 1990 why there was a delay and why the Commission went forward.

V The Decision

a. Failure to Give Reasons

Counsel for the Respondent Hospital argued at the hearing and in the factum filed in advance of the hearing that Section 37(3) of the Code creates a mandatory obligation that the Commission give reasons for a decision made to reconsider a previous decision. Section 37(3) provides:

> Every decision of the Commission on reconsideration together with the reasons therefor shall be recorded in writing and promptly communicated to the complainant and the person complained against and the decision shall be final.

Counsel for the Respondent Hospital argued that in failing to give reasons the Commission not only breached its statutory duty, it also breached the duty of procedural fairness by not allowing the Respondents the opportunity of knowing the case made against them. The Respondent Hospital took the position that as a result of the failure to provide reasons, the appointment of a board of inquiry was a nullity.A related but supporting argument by the Respondent Hospital was that in the present case there was no reason to be found on the Record for appointing a board of inquiry. Respondent Counsel points out in his factum:

> The Commission originally found, with reasons, that the situation did not warrant a Board of Inquiry being appointed. That decision was supported by the Office of Reconsideration. In the absence of reasons in the reconsideration decision, and

with a record that reveals that a Board of Inquiry should not have been appointed, it is submitted that the decision should be quashed.

Thus, Respondent Counsel argues that I should find that I do not have jurisdiction to continue with a full hearing because a condition precedent, the giving of reasons, was not fulfilled.

Commission Counsel conceded in her factum and in argument at the hearing that the Commission's decision on reconsideration was not accompanied by reasons as required by Section 37(3) of the Code. Commission Counsel argued therefore that the issue which I must consider was whether or not this breach of the Code was significant or sufficient enough to lead to an abuse of the board's processes under Section 23 of the Statutory Powers and Procedures Act if I was to continue with a full hearing of the matter. In other words, if as in Mr. Benmergui's case there had been a breach of procedural fairness to the Hospital Respondent then the same reasoning would apply and it would be an abuse of power to go forward with a hearing. Again, Commission Counsel stated that a board of inquiry cannot quash its own appointment, that is decide it does not have jurisdiction to proceed.

It is unnecessary for me to decide whether or not a board may quash its own appointment, since these facts do not warrant a decision that there is no jurisdiction. I am not persuaded that the failure to give reasons is a condition precedent to this Board's jurisdiction. It is not a significant enough breach of procedure to go to jurisdiction. I agree with Commission Counsel that the question is whether the error in procedure is a breach of the Commission's duty of fairness which would result in an abuse of process of this Board should a full hearing proceed.

Commission Counsel argued that the purpose or function of the requirement that reasons be provided is to apprise the Respondent of the case which it will have to meet before a board of inquiry. Commission Counsel argued further that if the procedural deficiency could be cured then it would not be an abuse of process for this Board to proceed. In supplementary submissions, Commission Counsel

argued that either by request for further disclosure or in a motion for particulars, Respondents could be provided with any information regarding the case that they might not already have.

I agree with submissions of Commission Counsel that reasons for a decision of an administrative Board are required to allow the party to know the case against it. While it is clear that the Commission should have given reasons and it was an error in their procedure not to give reasons, it is also possible to cure this deficiency. A request for further disclosure or a motion for particulars should provide adequate information for the Respondents to know the case against them and prepare a defence. Thus there is no abuse of process in continuing with a full hearing provided the deficiency is cured.

b. Unreasonable Delay

The Respondent Hospital also objected to this hearing going forward on the basis of delay. Counsel for the Respondent Hospital argued at the hearing and in the factum that the Hospital had been prejudiced in its ability to properly defend itself against the allegations made by the Complainants because of the delay. However, at the hearing into this matter, Counsel for the Respondent Hospital acknowledged that at least at this point he had no evidence of actual prejudice to present. It is clear from previous board of inquiry decisions that actual prejudice is needed in order to dismiss a case.

> The prejudice to a party occasioned by delay must indicate more than inconvenience; it must be sufficiently oppressive to prevent a response or defence from being made. An unreasonable delay creates an insurmountable problem: a key witness has died, documentary evidence has been destroyed, or some other circumstance has limited the opportunity to defend against the allegations in the complaint. Guthro v. Westinghouse Canada Inc. (2) (1991) 15 C.H.R.R. D/388, at paragraph 21. See also Munsch v. York Condominium Corp. (60) (unreported) July 2, 1992, (at p. 2).

Boards of inquiry in denying preliminary motions to dismiss on the basis of delay have held that should evidence of actual

prejudice be presented during the hearing they will retain jurisdiction to dismiss at that point or weigh any delay related prejudice or unfairness in making findings of fact or in fashioning a remedy.

I find that the objection to proceed with this matter on the basis of delay is at the present time not justified. However, I will take the same approach as other boards have and should there be evidence of actual prejudice presented at the hearing, I will retain jurisdiction to either dismiss or to make an appropriate decision as to costs.

c. Bias

Another basis of objection by the Respondent Hospital is that the Commission was biased or unduly influenced in granting reconsideration. In support of this objection the Respondent Hospital argues that the request for consideration and submissions on behalf of the Complainants were made by the firm headed by Mary Cornish who also chaired the Task Force reviewing the operation of the Commission. The Respondent Hospital argues that there is a reasonable apprehension of bias because of the firm which asked for the reconsideration on behalf of the Complainants and a record which, in his view, discloses that a board of inquiry should not have been appointed. In oral submissions the Respondent Hospital's Counsel stated that he had no other evidence to support a claim of bias.

Commission Counsel cites Newfoundland Telephone Company Limited (unreported, April 9, 1992 S.C.C.) as summing up the current state of the law with respect to the issue of bias and administrative tribunals.

> Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature. (at p. 14)

While a duty of fairness applies to all administrative bodies

the Supreme Court held that during an investigative stage a wide license must be given to board members making public comments.

> As long as those statements do not indicate a mind so closed that any submission would be futile, they should not be subject to attack on the basis of bias. (at p.17)

A stricter standard however applies to a board with an adjudicative function. The standard for an adjudicative body is not as rigid as what is expected of a judge presiding at a trial however, procedural fairness must be maintained. (Newfoundland Telephone, at p. 18) Citing the Saskatchewan Human Rights Commission v. Reimer an unreported case of the Saskatchewan Court of Appeal, October 14, 1992, quoting the Newfoundland Telephone case, Commission Counsel argued that the standard which is applicable to a Human Rights Commission with regard to bias is the standard of open-mindedness.

Whether the standard is open-mindedness or as the Hospital Counsel argues the stricter standard of apprehension of bias, there is no evidence to support that there was any bias under either standard. There is no evidence of any wrong doing by the Commission. This is also what the Divisional Court concluded in the Commercial Union case when the respondent in that case suggested that the Commission had somehow been influenced by a media campaign in making its decision to request a board of inquiry. There was no evidence to support a finding of bias. Therefore, I reject the motion to dismiss on the basis that the Commission was biased in making its decision to request a board of inquiry.

d. Shreve Case

At the hearing and again in supplementary submissions the Respondent Hospital argued that given all of the objections, unreasonable delay, bias, and a failure to give reasons for the decision to request a board of inquiry, this case should be dismissed.

In the supplementary submissions the Respondent relied on the

recent Shreve case. In Shreve the Board of Inquiry held that bias of an investigating Commission officer together with a lengthy delay in investigating the complaint and inadequate disclosure to the Respondent in combination precluded the Respondents from getting a fair hearing at the Board of Inquiry. While the Chair in this case held that each individual ground of objection was insufficient in itself to preclude a fair hearing, the combination of all three:

> ...seriously prejudiced the ability of the Respondents to prepare their case in a timely fashion. This violates the principal of fairness. It causes a prejudice that cannot really be cured at the Board of Inquiry stage since one power a Board definitely lacks is that to turn back the clock. (at p. 24)

The circumstances of the Respondent Hospital are distinguishable to those of the Respondents in the Shreve case and the Respondent Mr. Benmergui. In the Shreve case the combination of delay, bias of the investigator and lack of disclosure all worked together to make it impossible to get a fair hearing before the Board. There was nothing that the Chair of the Board of Inquiry could do to "cure" the deficiencies of the earlier process. There was also clear evidence of bias and lack of disclosure given at the Shreve hearing.

In the case of the Respondent Hospital, at least at this stage, I have not been provided with any evidence of actual prejudice as a result of the delay. With regard to the bias issue, again, there is no clear evidence of bias of the Commissioners. Rather, I am being asked to infer a bias and there is certainly no evidence to do so. As to the lack of reasons given on the decision to reconsider, this deficiency did not effect the decision of the Commissioners to request a board of inquiry. Moreover, any deficiency should be cured by additional disclosure of particulars of the Commission's case against the Respondent Hospital. These facts do not amount to a breach of fairness.

Thus even taken together the Respondent Hospital's objections are insufficient to warrant a permanent stay or dismissal of the

proceeding.

VI Interim Order on Motions

After lengthy, close review and consideration of the Respondents' and Commission's oral and written submissions and the case law provided to me, and for the reasons provided above, I have decided to permanently stay the complaints of Ms. Schofield and Ms. Suddard as against the Respondent Mr. Benmergui, and I find further that the motion of the Respondent Hospital cannot be sustained and is therefore refused.

DEBORAH J.D. LEIGHTON
Board of Inquiry
May 11 , 1993